

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
HISPANIC INFORMATION AND)	
TELECOMMUNICATIONS NETWORK, INC.)	File No. 950523DV
)	
For Extension of Time to Construct Educational)	
Broadband Service Station WLX557, Memphis,)	
Tennessee)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 2005

Released: March 9, 2005

By the Commission:

I. INTRODUCTION

1. In this *Order*, we consider an Application for Review (Application or AFR) filed on January 6, 1997, by Hispanic Information and Telecommunications Network, Inc. (HITN).¹ HITN requests the Commission reverse a decision released by the Video Services Division, Mass Media Bureau (Division) on December 4, 1996.² The Division denied HITN's petition for reconsideration of the September 9, 1996 action of the Division's Distribution Services Branch (DSB)³ denying HITN's above-captioned application for extension of time to construct Educational Broadband Service (EBS)⁴ Station WLX557, Memphis, Tennessee. For the reasons stated below, we grant HITN's AFR in part, reinstate

¹ HITN Application for Review (filed January 6, 1997) (Application). Wireless One, Inc. submitted an Opposition to HITN's Application on January 21, 1997. On May 7, 1997, HITN filed an Informal Reply to Opposition to Application for Review. On May 23, 1997, Wireless One, Inc. filed a motion to strike HITN's reply as untimely. HITN opposed that motion on June 3, 1997. We dismiss the HITN Informal Reply as being untimely filed pursuant to Section 1.115(d) of the Commission's Rules, which provides that any reply "shall be filed within 10 days after the opposition is filed." 47 C.F.R. § 1.115(d). HITN's reply was filed three months after the deadline established under the Commission's Rules.

² Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Gerald M. Zuckerman, Esq., Ref. No. 1800E3-JLB (Dec. 4, 1996) (VSD Dec. 4, 1996 Letter).

³ Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Benjamin Perez, Esq., Abacus Communications Company, File No. BPLIF-950523DV (Jan. 25, 1996) (DSB Jan. 25, 1996 Letter).

⁴ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing the Multipoint Distribution Service (MDS) and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Because the new rules are now in effect, we will refer to these services by their new names.

the Application, and direct the Wireless Telecommunications Bureau (Bureau) to reevaluate the Application pursuant to this *Memorandum Opinion and Order*.

II. BACKGROUND

2. On April 29, 1992, the Commission granted HITN's application for a new EBS Station in Memphis, Tennessee. Pursuant to Section 73.3598(b) of the Commission's Rules, HITN had eighteen months, or until October 29, 1993, to construct the station.⁵ On October 25, 1993, HITN filed a request for an extension of the construction deadline, representing that Hampton Roads, an entity with which it had an agreement, would proceed with the construction.⁶ That application was granted on March 23, 1994, and HITN was given until September 23, 1994 to construct the station.⁷ On September 23, 1994, HITN filed a second extension application.⁸ HITN represented that it was forced to end its relationship with the first proposed operator because the operator did not begin construction.⁹ Additionally, HITN represented that it had reached an agreement in principle with a commercial wireless operator, who HITN claimed would supply transmission equipment once a fully executed agreement had been reached.¹⁰ HITN represented that based on the terms of the above-referenced agreement, it would proceed with the installation of the transmission equipment and complete construction within the next six months.¹¹ The Mass Media Bureau granted HITN's second extension request on November 11, 1994, and ordered construction to be completed by May 23, 1995.¹²

3. On May 23, 1995, HITN filed another extension application.¹³ HITN explained that it had offered CAI Wireless Systems (CAI) an option to lease its excess capacity, which CAI had accepted.¹⁴ By letter dated January 25, 1996, the Acting Chief, DSB advised HITN that the explanations it gave for failing to construct failed to justify further extensions of time.¹⁵ Nevertheless, HITN was afforded an additional fifteen days to reflect the progress made on each station.¹⁶ HITN filed a response on February 9, 1996.¹⁷

4. On September 9, 1996, the DSB found that HITN had failed to demonstrate that additional time to construct was warranted under Section 73.3534(c) of the Commission's Rules,¹⁸ noting that HITN had ordered no equipment and made no concerted effort to undertake construction of the

⁵ 47 C.F.R. §73.3598(b) (1992).

⁶ File No. BMPLIF-931025DF.

⁷ *Id.*

⁸ File No. BMPLIF-940923DV.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ File No. BMPLIF-950523DV.

¹⁴ *Id.*

¹⁵ DSB Jan. 25, 1996 Letter.

¹⁶ *Id.*

¹⁷ Letter from Benjamin Perez, Esq. to Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau (Feb. 9, 1996).

¹⁸ 47 C.F.R. § 73.3534(c) (1997).

station.¹⁹ Accordingly, DSB cancelled HITN's construction authorization for WLX557 and deleted the call sign.

5. On October 15, 1996, HITN filed a petition for reconsideration of the DSB action,²⁰ which included a declaration from the Executive Vice President of Regulatory/Licensing at CAI, committing to construct HITN's Memphis EBS facilities and lease the excess capacity should HITN's license be reinstated.²¹ The petition also included a commitment to enter into an Antenna Site License Agreement from Motorola, in the event that HITN's license was reinstated.²² On December 4, 1996, the VSD, on reconsideration, denied HITN's petition.²³ The VSD explained that the Commission has a long established policy that applicants for extension of time to construct are not entitled to credit, nor will the Commission take into account construction efforts or any other actions that occur after the expiration of an authorized construction period.²⁴ The VSD concluded that HITN's construction permit expired on May 23, 1995 and the efforts that HITN relied upon to justify an extension took place after the permit expired and DSB cancelled the license.²⁵ Accordingly, the VSD did not consider any of HITN's post-authorization efforts.²⁶

6. The VSD further stated that HITN's explanation that it was not in a position to move forward and invest a significant amount of money without knowing how the Memphis market was going to develop on the commercial wireless side did not justify an extension.²⁷ The VSD on reconsideration recognized that EBS licensees might be dependent upon wireless cable operators to construct their facilities. With that in mind, however, the VSD concluded that the obligation to build the EBS facilities within the timeframe provided remains that of the licensee alone.²⁸ On January 6, 1997, HITN submitted the instant AFR.

III. DISCUSSION

7. Under our rules, the Commission grants applications for extension of time to construct EBS stations upon a specific and detailed narrative showing that the failure to complete construction was due to causes that were beyond the permittee's control, or upon a specific and detailed showing of other sufficient justification for an extension.²⁹ The instant AFR was filed over eight years ago. Between 1996 and March 2002, the former Mass Media Bureau acted on a large number of extension applications. Based upon the information available to us, it appears that that Bureau developed a policy of liberally granting extensions of time to construct for EBS stations. It is not clear that the Division's treatment of HITN's Application was consistent with its general treatment of other EBS applications for extension of

¹⁹ Letter from Clay C. Pendarvis, Acting Chief, Distribution Services Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission, to Benjamin Perez, Esq., Abacus Communications Company, File No. BPLIF-9500523DV (Sep. 9, 1996) (DSB Sep. 9, 1996 Denial Letter).

²⁰ HITN Petition for Reconsideration (filed Oct. 15, 1996).

²¹ See *id.* at Declaration of Timothy J. Santora, EVP Regulatory/Licensing.

²² See *id.* at Letter from Chris Hoker, Territory Business Manager, Motorola Network Services (Oct. 9, 1996).

²³ VSD Dec. 4, 1996 Letter.

²⁴ *Id.* at 2.

²⁵ *Id.* at 2-3.

²⁶ *Id.* at 2.

²⁷ *Id.* at 3.

²⁸ *Id.*

²⁹ 47 C.F.R. § 73.3534(c).

time to construct. For example, a review of the Commission's licensing records indicates that there are many instances where construction permits were extended such that the construction deadline was extended beyond the original ten-year license term.³⁰ In some of those cases, over ten applications for extension of time to construct were granted.³¹ Furthermore, it appears that most extensions have been granted without any published discussion of the criteria for extensions of time. In contrast, HITN's application for a third extension of time to construct was denied.

8. It is axiomatic that the Commission must explain reasons for treating similarly situated applicants differently.³² In this case, we question whether that requirement was met. We believe the appropriate course of action is to reinstate HITN's Application for processing consistent with our rules and policies.

IV. CONCLUSION AND ORDERING CLAUSES

9. In light of the foregoing, we conclude that partial grant of HITN's AFR is warranted under the circumstances presented. Specifically, we find that it is appropriate to reinstate HITN's Application and direct the Bureau to reevaluate whether the Application should be granted in light of the factors discussed in this *Memorandum Opinion and Order*.

10. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by Hispanic Information and Telecommunications Network, Inc. on January 6, 1997 IS GRANTED to the extent indicated, and is otherwise DENIED.

11. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Section 73.3534(c) of the Commission's Rules, 47 C.F.R. § 73.3534(c), that the Broadband Division of the Wireless Telecommunications Bureau SHALL REINSTATE the construction permit for Station WLX557 and SHALL REINSTATE AND PROCESS HITN's application for extension of time to construct (File No. 950523DV) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ See, e.g., Stations WLX505, WLX544, WLX553, WLX554, WLX690, WLX840, WLX879, WLX884.

³¹ See, e.g., Stations WLX505 (eleven extensions granted), WLX544 (twelve extensions granted), WLX553 (thirteen extensions granted).

³² *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965).